

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

POWERTECH (USA), INC.)

(Dewey-Burdock In Situ Uranium Recovery)
Facility))

) Docket No.: 40-9075-MLA

) Date: August 12, 2014

**POWERTECH (USA), INC.'S RESPONSE TO LICENSING BOARD ORDER
REGARDING DATA DISCLOSURE**

By Order dated August 6, 2014, the Atomic Safety and Licensing Board (Licensing Board) issued a directive to Powertech (USA), Inc. (Powertech) to disclose certain data identified as purchased from another uranium producing company and as requested by Consolidated Intervenor (CI) and the Oglala Sioux Tribe (Tribe) at the pre-hearing telephone conference held on August 5, 2014. By electronic message dated August 7, 2014, Powertech submitted a request to the Licensing Board asking for the opportunity to present legal argument regarding these data. By Order dated August 8, 2014, the Licensing Board directed all parties to submit a legal memorandum regarding two issues: (1) whether the data identified in Tribe Exhibit OST-19 meet the standard for "relevance" with respect to Contention 3 regarding ability to demonstrate hydrogeologic confinement and prevent migration of recovery solutions at the Dewey-Burdock ISR Project site and (2) whether the data identified in Tribe Exhibit OST-19 meet the requirements for mandatory disclosures under 10 CFR § 2.336(a). Further, in an electronic message dated August 11, 2014, the Licensing Board directed all parties to respond to

the current exhibit list prior to hearing. By this Response, Powertech hereby provides the Licensing Board with its response to both items.

I. EXHIBIT LIST

Powertech is in receipt of the Licensing Board's request for input regarding the exhibit list as it currently exists. More specifically, the Licensing Board has identified several exhibits submitted by Powertech including the initial testimony of Gwynn McKee (Powertech Exhibit APP-053) and Ms. McKee's *curriculum vitae* (CV) (Powertech Exhibit APP-054) as only pertaining to Contention 14A/B. While Powertech did label the exhibits highlighted in yellow as pertaining to Contention 14A/B, which has since been dismissed from this proceeding, Ms. McKee's initial testimony also includes material relevant to Contention 6 regarding mitigation measures. Ms. McKee's testimony contains a table of contents that shows several portions of her testimony pertain directly to Contention 6, including testimony regarding the effectiveness of mitigation measures for wildlife protection. This testimony also was used by Powertech in its initial position statement. As a result, Powertech respectfully requests that the Licensing Board maintain Powertech Exhibits APP-053 and 054 in the record as evidence. Powertech does not dispute the removal of the remaining highlighted exhibits from the evidentiary hearing or as a basis for the Licensing Board's as detailed in the August 11, 2014 electronic message directive.

II. DATA DISCLOSURE

As stated above, the Licensing Board has directed all parties to offer legal argument regarding the disclosure of data purchased by Powertech from another company. These data were identified by the Tribe in Tribe Exhibit OST-019 and were the subject of a motion for cross-examination, which was denied by the Licensing Board in its August 1, 2014 Order. Later, during the aforementioned August 5, 2014 prehearing telephone conference, both the Tribe and

CI argued that such data should be disclosed as relevant to Contention 3. However, as will be shown below and through the attached Affidavit of Mr. Richard Clement, President and Chief Executive Officer of Powertech, the data identified in Tribe Exhibit OST-019 are not at all relevant to the safety or environmental components of Contention 3. As such, since the identified data are not relevant to Contention 3, the 10 CFR § 2.336(a) requirements for mandatory disclosures do not apply to such data and Powertech should not be required to disclose the data to the Tribe or CI. Further, even if the data were declared to be relevant to Contention 3, the Part 2.336 mandatory disclosures requirement only applies to any identified data that are currently possessed by Powertech and not to the entirety of the data purchased, which is not currently in the custody and/or control of Powertech.

In order to be relevant to Contention 3, the identified data must provide the Tribe, CI, and/or NRC Staff with information pertaining to the affirmative demonstration by Powertech and NRC Staff that recovery solutions will not migrate to adjacent, non-exempt aquifers or that there is adequate confinement at the Dewey-Burdock ISR project site. Indeed, the current Federal Rule of Evidence defines “relevant evidence” as “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401 (2011). However, no such showing of relevance can be made for these data, because the sole reason for acquiring the identified data is to improve the uranium resource estimate and the economic efficiency of the hydrogeologic wellfield packages, which will be used to recover uranium as efficiently as possible. Thus, these data cannot provide CI or the Tribe with anything that would make their allegation more or less true and cannot serve as grounds for supporting or refuting NRC Staff’s conclusions in the ROD.

As shown in Mr. Clement's affidavit, the identified data were purchased by Powertech in order to better understand the location of the Dewey-Burdock ore body and the economic grades of various portions of the ore body. The data consist of electric logs and location maps. As is typical in the development of any ISR uranium deposit, a uranium recovery company seeks to know as precisely as possible where the ore body is located and, accordingly, where to put its wellfield to maximize recovery of uranium. These electric logs are used by ISR companies in the normal course of business to provide vital ore grade/location data, so that they can prepare both economic projections and effective wellfield hydrogeologic packages. Such data are used for economic reports by companies so that they can adequately justify resource grade projections and accurately forecast the amount of uranium in the identified ore body. Such data are used for wellfield hydrogeologic packages not to demonstrate confinement or that subsurface conditions are amenable to ISR operations, but rather to allow a company to precisely define the extent of an ore body in order to determine the appropriate location to put wells for recovery of uranium. In this regard, the electric logs merely save a company human and financial resources by negating the need for mapping a wellfield through additional delineation drilling, a process that is described in detail in both the FSEIS and Powertech's license application. But, these logs do not provide Powertech with any data that assist in understanding the number of historical exploration boreholes or whether historical boreholes have or have not been plugged and abandoned appropriately, since the electric logs are from boreholes already identified in Powertech's license application and do not provide any information on plugging and abandonment procedures. These electric logs also do not provide any insight as to the subsurface site stratigraphy at the Project site that is relevant to Contention 3, since electric logs by themselves do not demonstrate the ability to contain fluid migration. These purely economic

motives are the driving force behind acquisition of the data and why it was not acquired earlier in the process, especially at the license application phase. Indeed this is confirmed in Mr. Clement's affidavit wherein he states that the purchase agreement with the other company was executed to update the economic uranium resource estimate within the Dewey-Burdock ISR project site.

As a publicly traded company, Powertech has a responsibility to its shareholders to provide accurate uranium resource estimates to the maximum extent practicable. These data were acquired specifically for that purpose. Had these data been useful in further justifying the conclusions reached by Powertech and NRC Staff in the record of decision (ROD), Powertech would have attempted to acquire the data earlier and use it in its license application, requests for additional information (RAI) responses or submitted it as an exhibit to its initial and/or rebuttal statement of position. Further, neither CI nor the Tribe will gather any additional data from these electric logs to support their claims regarding the presence of faults, fractures or breccia pipes at the Project site or that historic boreholes were or were not appropriately plugged and abandoned. These electric logs also do not provide any additional site-specific information that could support or refute claims that recovery solutions will migrate from the recovery (ore) zone to adjacent, non-exempt aquifers. In fact, as noted by Mr. Clement, CI and the Tribe already have the data from the identified boreholes to which the electric logs pertain, including the number and location of boreholes. Thus, copying and disclosing these electric logs, which would be very expensive, would be a waste of the Licensing Board's time and Powertech's resources.

Additionally, there is Commission precedent that demonstrates that economic motives are not relevant to demonstrate injury-in-fact for a showing of legal standing for a hearing. *See e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327,*

332 n.4 (1983) (finding that economic interest as a ratepayer does not confer standing in NRC licensing proceedings); *see also Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 94 n. 64 (1993) (concluding that general economic concerns are not within the proper scope of issues to be litigated before the Boards). Thus, it logically follows that, if economic motives cannot support a finding of legal standing for a hearing, data devoted purely to economic motives cannot support a finding of relevance to technical or environmental issues within the scope of an admitted safety or environmental contention.¹ Therefore, the data identified in Tribe Exhibit OST-019 should not be disclosed to any parties as they are not relevant to Contention 3. Further, since the data are not relevant to Contention 3, they do not meet the threshold requirement for mandatory disclosures under 10 CFR § 2.336(a).

Lastly, given that these data contain economic information that is of considerable value and was purchased for a significant price, Powertech respectfully requests that any Licensing Board Order mandating disclosure of such data be subject to the current Protective Order or other appropriate confidentiality agreement, as the public disclosure of such data would significantly diminish or destroy its economic value. A showing of this can be made under 10 CFR § 2.390(a)(4) as these electric logs typically are maintained by uranium producing companies as trade secrets and/or confidential business information. Thus, Powertech respectfully requests that any determination by the Licensing Board that these data should be

¹ Admitted contentions at this stage of an NRC Subpart L proceeding are being addressed on their technical and/or environmental merits and not on economic motives.

disclosed be accompanied with a directive to subject such disclosure to the Protective Order or other appropriate confidentiality agreement.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

Dated: August 12, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“POWERTECH (USA), INC.’S RESPONSE TO LICENSING BOARD ORDER REGARDING DATA DISCLOSURE”** in the above captioned proceeding have been served via the Electronic Information Exchange (EIE) this 12th day of August 2014, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

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Dated: August 12, 2014